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**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 19-IB25**

**May 10, 2019**

**VIA EMAIL**

Christina Jedra  
[cjedra@gannett.com](mailto:cjedra@gannett.com)

**RE: FOIA Petition Regarding the Delaware Department of Correction**

Dear Ms. Jedra:

We write regarding your correspondence alleging that the Delaware Department of Correction ("DOC") violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA") with respect to your records request. We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005 regarding whether a violation of FOIA has occurred or is about to occur. Because DOC has provided a response to your request since the filing of your Petition, we find your Petition is now moot.

**BACKGROUND**

On March 12, 2019, you submitted a records request to DOC for the following documents: "[a]ll email correspondence from January 2018 to the present between current and former Connection CSP employees and DOC employees, including but not limited to the Bureau of Correctional Healthcare Services, regarding any funds that were misappropriated, misused, missing or otherwise unaccounted for."<sup>1</sup> On March 21, 2019, in response to a request from DOC, you narrowed your request to correspondence from October 1, 2018 to the present. On that same day, DOC's FOIA Coordinator responded, noting she would reach out to DOC staff and see what responsive records may be available and then send a good faith estimate for the time and costs. You thereafter followed up via email, and on April 4, 2019, DOC's FOIA Coordinator replied that an e-records request to the State Department of Technology and Information was being prepared and committed to keep you posted. Four days later, you followed up again, and DOC's FOIA

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<sup>1</sup> Petition.

Coordinator stated that she had “just received the signed copy of the request back” from the Commissioner and had sent it to the Department’s Chief of Information Technology to forward to the State Department of Technology and Information. You later requested another update, and on April 11, 2019, DOC informed you that it was still waiting for a response back from DTI regarding the cost of the search. On April 22, 2019, you advised DOC of your disappointment in the lack of response and stated that you would file a petition unless time and cost estimates were provided by the day’s end. Approximately two hours later, this Petition to our Office followed.

In your Petition, you allege that DOC failed to provide a cost estimate or any records at all over a month after you submitted your request for emails. You claim that this failure violates FOIA, stating that “[e]ven if the 15-day window was to be interpreted as the day I narrowed my request and not the date I originally submitted it, DOC blew the deadline.”<sup>2</sup> You point out that although statutorily required to do so within fifteen business days, DOC neither granted access, denied access, nor sent you a good faith estimate of how much additional time would be needed to complete the request. You also argue that the cost estimate for the email search must be provided within fifteen business days, citing to 29 *Del. C.* § 10003(i), which requires an itemized written cost estimate listing all charges expected to be incurred prior to requesting the information and technology personnel provide email records.

On April 26, 2019, DOC sent responsive correspondence to our Office with several documents attached (“Response”). DOC provided a copy of the response to the FOIA request it provided to you earlier that day, with several emails responsive to your request attached. DOC states that it searched the email accounts of over twenty individuals “based on the person’s past or present employment with the Department of Correction, Bureau of Correctional Health Services, and Bureau Chiefs and Deputy Bureau Chiefs in the Office of the Commissioner.”<sup>3</sup> DOC further notes that the “search that DTI conducted of the email included, but was not limited to Connections employees, for emails sent or received with the terms ‘misappropriation of funds, misuse of funds, missing funds and unaccounted funds.’”<sup>4</sup> DOC also attached an affidavit of its FOIA Coordinator attesting to the conduct of the search and stating nine responsive emails were provided at no cost. As its final response has been provided, DOC argues that the Petition is now “moot.”<sup>5</sup>

Your Reply to DOC’s Response dated April 29, 2019 raises new allegations challenging the adequacy of the response to your records request. You argue that the search parameters were not responsive to your request, as the DOC only searched for the terms “misappropriation of funds, misuse of funds, missing funds and unaccounted funds,” not the overall subject matter and that you did not agree to the list of individuals that DOC identified for the search.<sup>6</sup> Therefore, you

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<sup>2</sup> *Id.*

<sup>3</sup> Response; Affidavit of Kerri L. Bennett at ¶ 3.

<sup>4</sup> Response.

<sup>5</sup> *Id.*

<sup>6</sup> Reply.

conclude DOC did not provide a proper response to your FOIA request, as a “proper response would have included a timely time/cost estimate; a search based on subject matter, not exact keywords; and would involve a comprehensive search of email addresses not limited by a list I never agreed to.”<sup>7</sup>

## DISCUSSION

FOIA requires a public body to respond to a records request as soon as possible but no later than fifteen business days.<sup>8</sup> This response must grant or deny access to the records, or if more time is needed, a public body must provide a permissible reason for the delay and a good faith estimate of the amount of time needed to respond.<sup>9</sup> After multiple communications with you regarding the progress of the FOIA request, DOC provided a final response to your FOIA request on April 26, 2019, including documents responsive to your request at no charge.<sup>10</sup> DOC failed to provide the good faith estimate of the additional time needed to complete the request within fifteen business days, as required by the statute. We appreciate that an ongoing discussion between a public body and a requesting party may lead the requesting party to believe that the statutory deadline has been relaxed. The law, however, does not support that practice.

Based on this record, it is my determination that the allegations in your Petition are now moot, as DOC has completed its final response to your FOIA request.<sup>11</sup> The newly raised claims

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<sup>7</sup> *Id.*

<sup>8</sup> 29 *Del. C.* § 10003.

<sup>9</sup> *Id.*

<sup>10</sup> We note that the record does not reflect, nor does the Petition allege, that DOC acted in bad faith or engaged in a pattern of noncompliance.

<sup>11</sup> See, e.g., *Flowers v. Office of the Governor*, 167 A.3d 530, 546 (Del. Super. 2017) (“[T]he Court finds that any claimed violation regarding the Sample E-mails is moot because Appellants already possess them.”); *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Bd.*, 1994 WL 274295, at \*13 (Del. Ch. May 19, 1994) (“Because the documents that are the subject of [plaintiffs’] FOIA requests were turned over to the plaintiffs on August 13, 1993, that claim is moot.”); *Del. Op. Att’y Gen.* 18-IB30, 2018 WL 3118433, \*2 (June 7, 2018) (“Based upon the record, it is my determination that your Petition is now moot, as OGov has completed its response to your FOIA request.”); *Del. Op. Att’y Gen.* 18-IB25, 2018 WL 2994703, \*1 (May 15, 2018) (“Based on the facts as presented to this Office, it is our determination that your petition is moot, as the City has provided a response to your April 11 FOIA Request.”); *Del. Op. Att’y Gen.* 17-IB35, 2017 WL 3426275, \*1, FN 3 (July 31, 2017) (citing *Library, Inc. AFG Enterprises, Inc.*, 1998 WL 474159, at \*2 (Del. Ch. July 27, 1998) (citation omitted)) (finding a challenge to the wholesale denial of a request is moot and noting that a matter “is moot when there may have been a justiciable controversy at the time a matter was commenced, but that controversy ceases to exist prior to the arbiter’s determination.”).

regarding the adequacy of DOC's response are not part of the Petition.<sup>12</sup> Given the short time frame within which the Department of Justice must issue determinations, matters raised for the first time in a reply are severed and capable of being treated as separate petitions. To the extent that you wish to challenge the reasonableness of DOC's response, you may do so through a separate petition.<sup>13</sup>

### CONCLUSION

For the reasons set forth above, we conclude that the Petition is now moot.

Very truly yours,



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Aaron R. Goldstein  
Chief Deputy Attorney General

cc: Gregory E. Smith, Deputy Attorney General  
Dorey L. Cole, Deputy Attorney General

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<sup>12</sup> Our consideration is limited to the claims raised in the Petition. *See, e.g., Del. Op. Atty. Gen.* 18-IB51, 2018 WL 6591816, at \*FN 4 (Nov. 20, 2018); *Del. Op. Atty. Gen.* 12-IIB11, 2012 WL 5894039, \*4 (Nov. 7, 2012).

<sup>13</sup> We note that it is not uncommon for a public body to identify individuals involved in a matter to determine the scope of an email search, nor is a "key word" search uncommon in appropriate circumstances. Similarly, it is also not uncommon for a requesting party to specifically identify custodians or specific "key word" search criteria as part of a request for public records.